

Venugopal Vs. Krishnankutty

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Court : Kerala

Decided On : Jun-30-2004

Reported in : 2004(2)KLT855

Judge : K.S. Radhakrishnan and; J.M. James, JJ.

Acts : [Constitution of India](#) - Article 226

Appeal No. : W.P. (Cri.) No. 125 of 2004

Appellant : Venugopal

Respondent : Krishnankutty

Advocate for Def. : Sreelatha Parameswaran, Govt. Pleader

Advocate for Pet/Ap. : K.V. Bhadra Kumari and; Shibi K.P., Advs.

Disposition : Petition dismissed

Judgement :

K.S. Radhakrishnan, J.

1. This writ of habeas corpus has been moved by the father of two minor children for their release from the custody of respondents 1 and 2. Respondents 1 and 2 are the grand parents of the two minor children, children were born to the petitioner and third respondent. Elder daughter is aged 8 years and the younger

son is aged 6 years.

2. Petitioner and third respondent are living separately. Marriage was solemnized on 21.4.1994. Complaint of the petitioner is that third respondent eloped with another person leaving the children in the custody of her parents. Petitioner therefore approached fourth respondent, Deputy Superintendent of Police, for return of the children from the custody of respondents 1 and 2. Complaint of the petitioner is that respondents 1 and 2 are illegally detaining the children at the instance of the third respondent and his wife. Grand parents, according to the petitioner, are putting the children to considerable agony and for the welfare of the children they should hand over the children to the petitioner. Hence this habeas corpus petition.

3. We are of the view, this habeas corpus petition is not the remedy available to the petitioner. Facts would show that petitioner and third respondent are living separately. Further, petitioner's case is that third respondent wife has handed over the minor children to the custody of her parents. In other words, children are with the grand parents. If it is the case of the petitioner that children are not properly looked after by the grand parents and that for the better welfare of the children custody be given to the father, he has to approach the Family Court for appropriate orders and not through a writ of habeas corpus. We are not prepared to say that custody of the children with the grand parents is illegal. No reason has been stated as to why the petitioner has not availed of the alternative remedy available for the custody of the children. Writ of habeas corpus is festinum remedium and the power can be exercised only in appropriate cases. The Supreme Court in Mohammed Ikram Hussain v. State of Uttar Pradesh (AIR 1964 SC 1625) held that a writ of habeas corpus, though a writ of right, cannot be issued as a matter of course. Unless and until custody is illegal, right is not authorised by law Court will not issue rule nisi. Counsel appearing for the petitioner placed considerable reliance on the decision of the Supreme Court in Syed Saleemuddin v. Dr. Rukhsana and Ors. (2001) 5 SCC 247) and urged this Court to issue rule nisi and for the welfare of the children, their custody be entrusted to the petitioner. We are of the view, above mentioned rule is not applicable to the facts of this case. In this case, children are admittedly in the

custody of grand parents and entrusted by the mother. If it is the case of the petitioner that for the welfare of the children, their custody be handed over the petitioner, the remedy open to him is not by way of habeas corpus. So far as the children are in the custody of grand parents and this habeas corpus petition seeking their custody is not maintainable. In such circumstances, this petition is dismissed.

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